

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL LEONETTI,
Plaintiff,
vs.
BARRY JENSEN, *et al.*,
Defendants.

2:08-cv-1012-JCM-RJJ

ORDER

Plaintiff, a Nevada state prisoner has submitted a *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983.

The complaint must be screened pursuant to 28 U.S.C. §1915A. Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was

1 committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48
 2 (1988).

3 In addition to the screening requirements under § 1915A, a federal court must dismiss
 4 a prisoner's claims "if the allegation of poverty is untrue," or if the action "is frivolous or
 5 malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against
 6 a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c)(1), (2).
 7 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for
 8 in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard when reviewing
 9 the adequacy of a complaint or amended complaint.

10 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel*
 11 *v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
 12 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim
 13 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In
 14 making this determination, the court takes as true all allegations of material fact stated in the
 15 complaint, and the court construes them in the light most favorable to the plaintiff. *See Warshaw v.*
 16 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint are held to less
 17 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9
 18 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*).

19 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if
 20 the prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on
 21 legal conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or
 22 claims of infringement of a legal interest which clearly does not exist), as well as claims based on
 23 fanciful factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S.
 24 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

25 Plaintiff brings action against Barry Jensen, a police detective, James Guesman and
 26 Michael Root, attorneys who represented him in criminal proceedings, and four private citizens who

1 were witnesses concerning criminal charges of which petitioner was convicted. Petitioner brings
2 action against defendants for malicious prosecution, obstruction of justice, and other alleged
3 misdeeds surrounding his conviction for attempted sexual assault of a victim under age 16, a
4 conviction for which he is currently incarcerated.

When a prisoner challenges the legality or duration of his custody, or raises a constitutional challenge which could entitle him to an earlier release, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990), *cert. denied* 11 S.Ct. 1090 (1991). Moreover, when seeking damages for an allegedly unconstitutional conviction or imprisonment, “a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” *Heck v. Humphrey*, 512 U.S. 477, 487-88 (1994). “A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.” *Id.* at 488. Plaintiff has not, and indeed, cannot allege that his conviction has been reversed or otherwise invalidated. Plaintiff fails to state a cognizable civil rights claim. Because amendment would be futile, this action is being dismissed with prejudice and without leave to amend.

18 **IT IS THEREFORE ORDERED** that this action is **DISMISSED** for failure to state
19 a claim. The clerk shall enter judgment accordingly.

DATED this 9th day of January, 2009.

Jewett C. Mahan
UNITED STATES DISTRICT JUDGE